In the District Court of the United States for the Western District of New York

CIVIL ACTION No. 1408

THE HANNA FURNACE CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission,[1] pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[2] entered January 11, 1944, of a specially constituted court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 11,

[1] Certain railroads are also defendants-appellees.

[2] The District Court also entered a written opinion (District Judge Burke dissenting) as well as findings of fact and conclusions of law.

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1942, prohibited payment of an allowance to appellant by appellee rail carriers for switching service performed by appellant within its pig-iron plant at Buffalo, New York. An appeal to this Court was allowed March 6, 1944, and the appeal papers were served upon these appellees on March 8, 1944.

The Court, in view of the recent argument before it of *United States* v. *Wabash R. Co.*, No. 453, this Term, is no doubt thoroughly familiar with the setting of such terminal service cases as the present one. In 1931, in *Ex Parte 104*, 209 I. C. C. 11, the Commission on its own motion instituted an extensive general investigation relating to the payment of allowances to industries for the performance of terminal switching. The Commission there reached the general conclusion that when a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, due to interruption or interference by the desires of an industry or the disabilities of its plant, the service beyond such point of interruption or interference is in excess of that performed in simple switching or team-track delivery.[1] It further concluded that

[1] "Simple switching delivery" and "team-track delivery" are well understood terms in the lexicon of commerce law. The former means placing a car on a siding leading to a plant. The latter means putting cars on a spur belonging to a railroad to which there is access by wagons or other conveyances, and in this type of switching the unloading must be made at the convenience of the railroad.

services beyond that point were in excess of the carriers' transportation obligation under their line-haul rates and that the performance of such services by the carriers under such rates, or the payment by them of allowances to shippers for the performance of such services by the latter, was an unlawful rebate in violation of Section 6 (7) of Part I of the Interstate Commerce Act (49 U. S. C. 6 (7)).

In supplemental reports under *Ex Parte 104*, 209 I. C. C. 11, the Commission has since applied these general principles to the particular facts at many individual plants. Its orders condemning allowances on this theory have come before this Court on numerous occasions and have been uniformly sustained,[4] and the standards enunciated in *Ex Parte 104* are therefore no longer open to attack. The Commission's present report (253 I. C. C. 613) ordering the discontinuance of the allowance of appellant's plant is merely another of these supplemental reports (the 67th).

The Commission's report describes in detail the situation with respect to the switching of inbound and out-bound line-haul traffic at appellant's plant, which is presently performed by appellant under an allowance from the railroad appellees

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[4] *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156; *Inland Steel Co.* v. *United States*, 306 U. S. 153.

of 90 cents per loaded car. It points out that in addition to such switching, appellant performs over the same tracks a large amount of purely intra-plant switching, and frequently intermingles line-haul cars with purely intra-plant units. It states that "the record is persuasive that railroad switching of the line-haul cars in the plant would be marked by frequent interruptions and delays occasioned by intra-plant switching interference, as well as the numerous stops to open and close switches incident to operations over so extensive a network of plant tracks." It further states that from the evidence concerning the extent and character of line-haul switching operations on appellant's complex system of industrial tracks, it was evident that such service was in excess of team-track or simple switching delivery. The Commission concluded that the transportation service which the railroad appellees were obligated to perform under their line-haul rates began and ended at the interchange tracks, described of record, and did not include the switching service beyond that point now performed by appellant under this allowance. The Commission further concluded that by means of the allowance made by the railroad appellees to appellants, the railroads were remitting a portion of their line-haul transportation rates in violation of Section 6 (7) of Part I of the Interstate Commerce Act.

The only issue decided by the District Court and now before this Court is whether the Commis-

sion's conclusion that the carriers' line-haul obligation at appellant's plant began and ended at the interchange tracks and did not include switching within the plant, was justified.[5] It is settled beyond doubt by decisions of this Court that the determination as to where transportation ends is a factual one for the Commission rather than for the courts, and that its conclusion must be sustained if suported by substantial evidence. *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402, 409–411; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *Swift & Co.* v. *United States*, 316 U. S. 216, 225, 231; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. R. Co.*, No. 43, this Term, pamphlet p. 7.

The District Court painstakingly reviewed the evidence before the Commission.[6] It concluded that there was substantial evidence to support the Commission's finding that railroad line-haul switching in appellant's plant would be subject to interruption and interference. Under the now unassailable standards set forth in *Ex Parte 104*, 209 I. C. C. 11, it further concluded that the Com-

[5] The issue as to whether the Commission must properly require cessation of unlawful terminal switching practices at plants of all competitors simultaneously to prevent discrimination and preference, raised in *United States* v. *Wabash R. Co.*, No. 453, this Term, is not here presented.

[6] This included considerable evidence relating to appellant specifically taken at the original general hearing in *Ex Parte 104*, 209 I. C. C. 11, as well as the record made in the 67th supplemental proceeding dealing with appellant in particular.

mission's conclusion that line-haul transportation did not include such switching, was justified. It is submitted that the District Court's decision was clearly right, that the present appeal presents no substantial question, and that the decision should therefore be affirmed without argument.

From the Court's decision, it appears that the Commission had before it a blueprint showing in detail appellant's extensive plant buildings and facilities; a network of 66 railroad tracks, 14 miles in total length, connecting directly or indirectly with these buildings; and six separate points where materials were loaded and unloaded. There was also evidence that intra-plant switching[1] was extensive and much greater in extent than line-haul switching. For instance, during the first six months in 1930, "fairly comparable with the like period in 1942," 12,875 cars were switched in intra-plant service and 2,306 in line-haul service. An average of 113 loaded cars was switched daily, and there were altogether several hundred switch movements daily. Switching was done 24 hours a day, one of seven locomotives employed being constantly in use. There was, as the Court stated, no direct evidence concerning the movement of particular materials in intra-plant switching from the unloading points to the places

[1] Gondola and hopper cars owned by appellant and, to some extent, freight cars owned by the railroad are used in the intra-plant switching.

where utilized.[8] But there was, as the Court held, abundant circumstantial evidence from which the Commission could properly conclude what these intra-plant switching movements were, and that the intra-plant switching would prevent the railroads from doing the line-haul switching at their ordinary operating convenience without interruption or interference. The location of the buildings and tracks (obvious from the blueprint), the extent of the intra-plant switching, the nature of the materials, and the plant products were referred to in this connection.[9] There are numerous other indications in the evidence, mentioned by the Court, that intra-plant and line-haul switching, if done respectively by the appellant and the railroads separately, would interfere with each other. For example, it appears that both kinds of cars are presently intermingled; that appellant preferred to do the line-haul switching itself despite the fact that such switching cost it $1.73 per car, and it received an allowance of only 90¢ per car from the railroads; and that this switching would be much more costly to the railroads than switching in their own yards.

[8] There was, however, direct evidence as to switching movements made with respect to the line-haul cars.

[9] As the Court properly stated: "We believe there is little in the decisions in these cases [the Commission's decisions considered in the *Tin Plate* case] showing specifically what the intra-plant movements were, but there, as here, the conclusions in this respect have been largely drawn from description of the nature of the industry, the layout of its tracks, and the extent of operations over there. * * *"

The only testimony that intraplant switching would not interfere with line-haul switching was by appellant's witness Frederickson. But, as the District Court stated, "The most liberal construction that can be placed upon his testimony is that by the stoppage of intraplant cars in movement deliveries could be made to certain spotting points without interference." He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope[10] rather than of experience which the Commission was entitled to weigh and to refuse to accept at face value.[11]

For the foregoing reasons, it is evident that no substantial question is presented by this appeal. It is respectfully submitted that the judgment of the District Court should be affirmed.

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(S.) DANIEL W. KNOWLTON,
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MARCH 1944.

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[10] Cf. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396, 400.

[11] "The value and weight of the evidence given by railroad and plant executives and the inferences to be drawn from it were for the Commission." *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above motion to affirm upon each of the following named counsel by mailing them a copy thereof this 17th day of March, 1944:

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